

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-489V

Filed: November 6, 2017

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DULCE AND SEAN REILLY, parents
and natural guardians of E.R., a minor,

Petitioners,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

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Special Master Sanders

Decision on Proffer; Damages; Diphtheria-
Tetanus-Acellular-Pertussis (“DTaP”)
Vaccine; Infantile Spasms.

Edward M. Kraus, Law Offices of Chicago Kent, Chicago, IL, for Petitioners.

Ryan D. Pyles, United States Department of Justice, Washington, DC, for Respondent.

DECISION AWARDING DAMAGES¹

On July 27, 2009, Dulce and Sean Reilly (“Petitioners”) filed a petition on behalf of their minor child, E.R., pursuant to the National Vaccine Injury Compensation Program.² 42 U.S.C. §§ 300aa-10 to -34 (2012). Petitioners allege that the diphtheria-tetanus-acellular-pertussis (“DTaP”) vaccine administered on June 21, 2007 caused E.R. to suffer from a seizure disorder. Ruling Entitlement (May 31, 2016) at 1-2, ECF No. 107.

¹ This decision shall be posted on the United States Court of Federal Claims’ website, in accordance with the E-Government Act of 2002, 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services). In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to delete medical or other information that satisfies the criteria in § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, the undersigned agrees that the identified material fits within the requirements of that provision, such material will be deleted from public access.

² The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758, codified as amended, 42 U.S.C. §§ 300aa-10 to -34 (2012) [hereinafter “Vaccine Act” or “the Act”]. Hereinafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

Special Master Hamilton-Fieldman issued a Ruling on Entitlement on May 31, 2016. *Id.* She held that Petitioners' theory and medical records satisfied the three-prong test in *Althen v. Secretary of Health and Human Services*, 418 F.2d 1274, 1278 (Fed. Cir. 2005), and Petitioners were therefore entitled to compensation. *Id.* at 19-22.

On June 22, 2016, Special Master Hamilton-Fieldman issued a Damages Order encouraging the parties to identify and provide information that will be "necessary to assess the appropriate amount of compensation to be awarded in this case." Dam. Order at 7, ECF No. 111. The case was reassigned to the undersigned on January 10, 2017. Not. Reassignment, ECF No. 115.

Respondent filed a Proffer on Award of Compensation ("Proffer") on November 2, 2017. Proffer, ECF No. 126. Based on the record as a whole, the undersigned finds that Petitioners are entitled to an award as stated in the Proffer.

Pursuant to the terms stated in the Proffer, attached as Appendix A, the undersigned awards Petitioners:

- A. **A lump sum payment of \$1,268,787.00, (representing compensation for lost future earnings (\$750,984.00), pain and suffering (\$250,000.00), and life care expenses for Year One (\$267,803.00)), in the form of a check payable to [P]etitioners as guardians/conservators of the estate of E.R., for the benefit of E.R.; and**
- B. **A lump sum payment of \$130,000.00, representing compensation for past unreimbursable expenses, [in the form of a check] payable to Dulce Reilly and Sean Reilly, [P]etitioners; and**
- C. **An amount sufficient to purchase an annuity contract, subject to the conditions described [in Section II.C.], that will provide payments for the life care items contained in the life care plan, as illustrated by the chart [attached to the Proffer], and paid to the life insurance company from which the annuity will be purchased.**

Proffer 3-5.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court **SHALL ENTER JUDGMENT** herewith.³

IT IS SO ORDERED.

³ Pursuant to Vaccine Rule 11(a), entry of judgment is expedited by the parties' joint filing of notice renouncing the right to seek review.

s/Herbrina D. Sanders
Herbrina D. Sanders
Special Master

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

DULCE and SEAN REILLY, parents and
natural guardians of E.R., a minor,

Petitioners,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

No. 09-489V

Special Master Herbrina Sanders
ECF

RESPONDENT'S PROFFER ON AWARD OF COMPENSATION

Respondent submits the following recommendations regarding items of compensation to be awarded under the Vaccine Act.

I. Items of Compensation

A. Life Care Items

The parties engaged life care planners Tresa Johnson, RN, BSN, CNLCP, and M. Virginia Walton, RN, MSN, FNP, CNLCP, to provide an estimation of E.R.'s future vaccine-injury related needs, and the parties' planners came to a joint consensus regarding appropriate items of care. All items of compensation identified by the parties' joint life care plan dated October 25, 2017, are supported by the evidence, and are illustrated by the chart entitled Summary of Life Care Items, attached hereto as Tab A. Respondent proffers that E.R. should be awarded all items of compensation set forth in the joint life care plan and illustrated by the chart attached at Tab A. Petitioners agree.

B. Lost Earnings

The parties agree that based upon the evidence of record, E.R. will never be gainfully employed. Therefore, respondent proffers that E.R. should be awarded full lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B). Respondent proffers that the appropriate award for E.R.'s lost future earnings is \$750,984.00 at net present value. Petitioners agree.

C. Pain and Suffering

Respondent proffers that E.R. should be awarded \$250,000.00 for actual pain, suffering, and emotional distress, consistent with the statutory cap on awards for this element of damages. *See* 42 U.S.C. § 300aa-15(a)(4). Petitioners agree.

D. Past Unreimbursable Expenses

Evidence supplied by petitioners document their expenditure of past unreimbursable expenses related to E.R.'s vaccine-related injury. Respondent proffers that petitioners should be awarded past unreimbursable expenses in the amount of \$130,000.00. Petitioners agree.

E. Medicaid Lien

To the best of respondent's knowledge and upon the representation of petitioners, E.R. has never received Medicaid benefits. Accordingly, there is no Medicaid lien.

F. Attorneys' Fees and Costs

This proffer does not address final attorneys' fees and costs. Petitioners are entitled to reasonable attorneys' fees and costs, to be determined at a later date upon petitioners filing substantiating documentation.

II. Form of the Award

The parties recommend that the compensation provided to E.R. should be made through a combination of one-time lump sum payments and future annuity payments as described below, and request that the Special Master's decision and the Court's judgment award the following for all compensation¹ available under 42 U.S.C. § 300aa-15(a).

Respondent proffers and petitioners agree that an award of compensation include the following elements:

A. A lump sum payment of **\$1,268,787.00**, (representing compensation for lost future earnings (\$750,984.00), pain and suffering (\$250,000.00), and life care expenses for Year One (\$267,803.00)), in the form of a check payable to petitioners as guardians/conservators of the estate of E.R., for the benefit of E.R. No payment shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardians/conservators of the estate of E.R.;

B. A lump sum payment of \$130,000.00, representing compensation for past unreimbursable expenses, payable to Dulce Reilly and Sean Reilly, petitioners; and

C. An amount sufficient to purchase an annuity contract,² subject to the conditions described below, that will provide payments for the life care items contained in the life care plan, as illustrated by the chart at Tab A, attached hereto, and paid to the life insurance company³ from

¹ Should E.R. die prior to entry of judgment, respondent would oppose any award for future medical expenses, future lost earnings and future projected pain and suffering and the parties reserve the right to move the Court for appropriate relief.

² To satisfy the conditions set forth herein, in respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

³ The Life Insurance Company must have a minimum of \$250,000,000 capital and surplus, exclusive of any mandatory security valuation reserve. The Life Insurance Company must have one of the following ratings from two of the following rating organizations:

which the annuity will be purchased.⁴ Compensation for Year Two (beginning on the first anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to petitioners as guardian/conservators of the estate of E.R., only so long as E.R. is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to petitioners in monthly, quarterly, annual or other installments. Annual totals set forth in the far-right column of the chart at Tab A describe only the total yearly sum to be paid for the benefit of E.R. and do not require that the payment be made in one annual installment.

1. Growth Rate

Respondent proffers that a four percent (4%) growth rate should be applied to all life care items. Thus, the benefits illustrated in the chart at Tab A that are to be paid through annuity payments should grow at four percent (4%) compounded annually from the date of judgment.

2. Life-Contingent Annuity

Petitioners as guardians/conservators of the estate of E.R. will continue to receive the annuity payments from the Life Insurance Company only so long as E.R. is alive at the time that

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- a. A.M. Best Company: A++, A+, A+g, A+p, A+r, or A+s;
 - b. Moody's Investor Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;
 - c. Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or AAA;
 - d. Fitch Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA.

⁴ Petitioners authorize the disclosure of certain documents filed by the petitioners in this case consistent with the Privacy Act and the routine uses described in the National Vaccine Injury Compensation Program System of Records, No. 09-15-0056.

a particular payment is due. E.R.'s estate shall provide written notice to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of E.R.'s death.

3. Guardianship

No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardians/conservators of E.R.'s estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardians/conservators of the estate of E.R., any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of E.R. upon submission of written documentation of such appointment to the Secretary.

III. Summary of Recommended Payments Following Judgment

A.	Lump Sum paid to petitioners as guardians/conservators of E.R.'s estate, for the benefit of E.R.:	\$ 1,268,787.00
B.	Lump sum paid to petitioners:	\$ 130,000.00
C.	An amount sufficient to purchase the annuity contract described above in section II. C.	
D.	Reasonable final attorneys' fees and litigation costs:	TBD

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

C. SALVATORE D'ALESSIO
Acting Director
Torts Branch, Civil Division

CATHARINE E. REEVES
Deputy Director
Torts Branch, Civil Division

HEATHER L. PEARLMAN
Assistant Director
Torts Branch, Civil Division

s/ RYAN D. PYLES
RYAN D. PYLES
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, D.C. 20044-0146
Tel: (202) 616-9847

DATED: November 2, 2017

Pet. Ethan Reilly
D.O.B. 12/15/2006

DATE: 10/25/17
TIME: 10:01 AM

SUMMARY OF LIFE CARE ITEMS - JOINT LIFE CARE PLAN dated October 25, 2017

ITEM OF CARE		Insurance	Medical Care	Ancillary Services	Medications	Supplies	Home Services	Transportation	Home Modifications	TOTALS of Items with a 4.0% Growth Rate	TOTALS OF 4.0% ITEMS & APPLYING THE GROWTH RATE
GROWTH RATE		4.0%	4.0%	4.0%	4.0%	4.0%	4.0%	4.0%	4.0%		
AGE	YEAR										
11	2017	6,000.00	0.00	7,778.00	3,591.50	9,941.97	137,760.00	2,731.04	100,000.00	267,803	267,803
12	2018	6,000.00	0.00	9,478.00	3,591.50	3,200.38	137,760.00	2,731.04	0.00	162,761	169,271
13	2019	6,000.00	0.00	9,478.00	3,591.50	3,200.38	137,760.00	2,731.04	0.00	162,761	176,042
14	2020	6,000.00	0.00	9,478.00	3,591.50	3,200.38	137,760.00	2,731.04	0.00	162,761	183,084
15	2021	6,000.00	0.00	9,478.00	3,591.50	3,200.38	137,760.00	2,731.04	0.00	162,761	190,407
16	2022	6,000.00	0.00	91,750.00	3,591.50	3,200.38	137,760.00	2,731.04	0.00	245,033	298,120
17	2023	6,000.00	0.00	91,750.00	3,591.50	3,200.38	137,760.00	2,731.04	0.00	245,033	310,045
18	2024	6,000.00	0.00	91,750.00	3,591.50	3,200.38	137,760.00	2,731.04	0.00	245,033	322,447
19	2025	6,000.00	0.00	91,750.00	3,591.50	3,200.38	137,760.00	2,731.04	0.00	245,033	335,344
20	2026	6,000.00	0.00	91,750.00	3,591.50	3,200.38	137,760.00	2,731.04	0.00	245,033	348,758
21	2027	6,000.00	0.00	91,750.00	3,591.50	3,200.38	137,760.00	2,731.04	0.00	245,033	362,709
22	2028	6,000.00	0.00	91,750.00	3,591.50	3,200.38	137,760.00	2,731.04	0.00	245,033	377,217
23	2029	9,189.76	0.00	11,888.00	3,591.50	3,200.38	144,000.00	119.84	0.00	171,989	275,361
24	2030	9,189.76	0.00	11,888.00	3,591.50	3,200.38	144,000.00	119.84	0.00	171,989	286,375
25	2031	9,189.76	0.00	8,290.00	3,591.50	3,200.38	144,000.00	119.84	0.00	168,391	291,600
26	2032	13,310.76	424.40	8,290.00	3,338.01	3,200.38	144,000.00	119.84	0.00	172,683	310,993
27	2033	13,456.44	424.40	8,290.00	3,338.01	3,200.38	144,000.00	119.84	0.00	172,829	323,706
28	2034	13,677.48	424.40	8,290.00	3,338.01	3,200.38	144,000.00	119.84	0.00	173,050	337,084
29	2035	13,863.84	424.40	8,290.00	3,338.01	3,200.38	144,000.00	119.84	0.00	173,236	350,945
30	2036	9,577.68	424.40	8,290.00	2,794.01	3,200.38	144,000.00	119.84	0.00	168,406	354,807
31	2037	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	366,545
32	2038	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	381,207
33	2039	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	396,455
34	2040	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	412,313
35	2041	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	428,806
36	2042	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	445,958
37	2043	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	463,796
38	2044	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	482,348
39	2045	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	501,642
40	2046	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	521,708

Pet. Ethan Reilly
D.O.B. 12/15/2006

DATE: 10/25/17
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GROWTH RATE		4.0%	4.0%	4.0%	4.0%	4.0%	4.0%	4.0%	4.0%		
AGE	YEAR										
41	2047	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	542,576
42	2048	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	564,279
43	2049	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	586,850
44	2050	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	610,324
45	2051	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	634,737
46	2052	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	660,127
47	2053	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	686,532
48	2054	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	713,993
49	2055	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	742,553
50	2056	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	772,255
51	2057	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	803,145
52	2058	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	835,271
53	2059	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	868,682
54	2060	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	903,429
55	2061	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	939,566
56	2062	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	977,149
57	2063	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	1,016,235
58	2064	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	1,056,884
59	2065	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	1,099,159
60	2066	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	1,143,126
61	2067	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	1,188,851
62	2068	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	1,236,405
63	2069	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	1,285,861
64	2070	9,577.68	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	167,286	1,337,296
65	2071	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	1,354,188
66	2072	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	1,408,355
67	2073	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	1,464,690
68	2074	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	1,523,277
69	2075	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	1,584,208
70	2076	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	1,647,577

Pet. Ethan Reilly
D.O.B. 12/15/2006

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SUMMARY OF LIFE CARE ITEMS - JOINT LIFE CARE PLAN dated October 25, 2017

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GROWTH RATE		4.0%	4.0%	4.0%	4.0%	4.0%	4.0%	4.0%	4.0%		
AGE	YEAR										
71	2077	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	1,713,480
72	2078	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	1,782,019
73	2079	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	1,853,300
74	2080	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	1,927,432
75	2081	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	2,004,529
76	2082	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	2,084,710
77	2083	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	2,168,099
78	2084	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	2,254,822
79	2085	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	2,345,015
80	2086	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	2,438,816
81	2087	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	2,536,369
82	2088	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	2,637,823
83	2089	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	2,743,336
84	2090	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	2,853,070
85	2091	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	2,967,193
86	2092	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	3,085,880
87	2093	5,175.44	424.40	7,170.00	2,794.01	3,200.38	144,000.00	119.84	0.00	162,884	3,209,315
		608,132	26,313	1,170,146	229,277	253,171	11,013,120	40,562	100,000	13,440,721	81,065,682
		4.52%	0.20%	8.71%	1.71%	1.88%	81.94%	0.30%	0.74%		100.00%

This Report was generated using Sequoia Settlement Services, LLC Software (c) 1990